Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

October Term, 1994

TERRY GOLDEN,

Petitioner,

vs.

EL CAMINO RESOURCES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED

1. Can litigants who have not been served be required to make direct contact with the court or opposing counsel to inform them of the failure to serve, on pain of being found to have waived the defense of lack of personal jurisdiction?

2. Can the failure to hold a hearing to set the amount of damages neither liquidated nor determinable by computation before granting default judgment be raised by a motion for relief from default?

3. Can a default judgment based entirely on conclusory allegations, and of which the defendant had no notice whatever, be allowed to stand?

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In the Supreme Court of the United States

October Term, 1994

SYSTEMS TECHNOLOGY, INC.,

Plaintiff

vs.

EL CAMINO RESOURCES, LTD.

Defendant/Third-Party
Plaintiff/Appellee,

vs.

TERRY GOLDEN,

Third Party
Defendant/ Appellant

PETITION FOR WRIT OF CERTIORARI

Petitioner Terry Golden respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, filed on August 30, 1994, affirming the decision of the District Court herein.

ORDERS BELOW

The January 28, 1991 Default Judgment is attached hereto as Appendix A. The March 3, 1993 judgment and opinion of the Fifth Circuit Court of Appeals is attached hereto as Appendix B. The September 2, 1993 Findings of Fact and Conclusions of Law of the United States Magistrate Judge is attached hereto as Appendix C. The September 2, 1993 judgment denying Terry Golden's Motion to Set Aside Default is attached hereto as Appendix D. The August 30, 1994 order of the Court of Appeals for the Fifth Circuit affirming the denial of relief from default is attached hereto as Appendix E.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed the denial to Petitioner of relief from default on August 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 55(a):

> "**(a) Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made

to appear by affidavit or otherwise, the clerk shall enter the party's default."

Federal Rule of Civil Procedure 60(b):

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake; inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; . . . "

STATEMENT OF THE CASE

On April 11, 1989, Systems Technology, Inc., a Delaware corporation with its principal place of business in Texas, filed a lawsuit against El Camino Resources, Ltd., a California corporation and Appellee herein, for breach of its contract to purchase a computer from

Systems Technology (Record on Appeal [hereinafter "RA"], pp. 1-7).

On May 16, 1989, El Camino filed notice of removal of the case to the United States District Court (RA 1), its answer to Systems Technology's petition (RA 11), and its counterclaim for breach of contract against Systems Technology (RA 17).

On October 16, 1989, El Camino filed its amended counterclaim against Systems Technology and third-party complaint against Barbara Richardson, president of Systems Technology (RA 45).

On October 12, 1990, El Camino and Systems Technology attorney of record Allen Landerman, whom Golden had never retained to represent him personally (RT 19), agreed to an order which granted El Camino leave to file a third-party complaint against Terry Golden, the sole owner of Systems Technology, and Petitioner herein, and at the same time granted Landerman leave to file an answer on behalf of Barbara Richardson, which he had not done (RA 100, 426).

On that same day, October 12, 1990, El Camino filed the counterclaim and third-party complaint and delivered a copy of it to Landerman. Landerman agreed with El Camino's counsel to accept service for Golden (RA 428), but, as the magistrate found below, he had no

authority from Golden to do so (RA 432). Further, the magistrate found that while Landerman transmitted a copy of the order giving leave to file the counterclaim and third-party complaint on October 23, 1990 (RA 429), he never provided Golden with a copy of the counterclaim and third-party complaint itself (RA 430).

The counterclaim and third-party complaint alleged breach of contract against Systems Technology (RA 103-05), interference with business relations and contracts against Systems Technology, Richardson and Golden (RA 106-07), and "alter ego" against Golden (RA 107).[1] The totality of the alter ego allegation was as follows:

> "THIRD CLAIM - ALTER EGO
>
> 19. Third Party Defendant Golden is the alter ego of Counterdefendant Systems. Additionally, Systems is a sham corporation established by Golden to defraud and attempt to defraud its creditors. As such, Golden is personally responsible and liable for the acts and omissions of Systems as described above."
>
> RA 107

---

[1]There was also an "interference with business relations" cause of action against Systems Technology, Richardson, and Golden, but it is irrelevant here because no damages were requested or awarded on the basis of it in the default proceedings (RA 164, 171).

On January 25, 1991, no answers to the third-party complaint having been filed by Landerman, El Camino requested default against Golden and Richardson (RA 160). The supporting affidavit of El Camino's president, David Harmon, set the damages at $151,629.64, basing that figure solely on the following recitation:

> "(1) expenses and losses to cover -- $131,419.64; (2) F1005 board not returned -- $9,500; and (3) lost income from Northrop contract -- $10,700."
>
> RA 164.

The default was entered without a hearing (RA 168). On January 28, 1991, the District Court filed default judgment against Golden in the amount of $151,629.64, plus attorney's fees of $9,610 (RA 170-71). Neither Systems Technology nor Golden had entered any appearance or filed any papers with the district court in this matter between October 12, 1990 and January 28, 1991.

Landerman did not provide Golden a copy of the application for default, the entry of default, or the default judgment (RA 430).

On April 15, 1991, Golden sent Landerman his draft answers to El Camino's interrogatories directed to him as a party. The caption of the interrogatories showed Golden as a third-party defendant (RA 332, 432).

The interrogatories had been transmitted to Golden on December 5, 1990 (RA 313).

On July 8, 1991, Landerman filed a motion for relief from default on Golden's behalf (RA 204), which was denied on July 17, 1991 (RA 216-17). Golden was never informed of the motion or its denial (RA 430).

On August 8, 1991 El Camino filed a stipulation to dismiss its claims against Systems Technology without prejudice because it had already obtained judgment against Golden (RA 218).

In August, 1991 a non-jury trial of Systems Technology's contract claim against El Camino was held before Magistrate Sanderson. Neither Golden, Richardson, nor any other witness appeared for Systems Technology, because Landerman had failed to inform Golden and Richardson of the trial date (RT 29-30). As a result, judgment was entered in favor of El Camino (RA 228).

Landerman agreed to a public reprimand for his failures to meet deadlines and client's needs during the period in which he represented Golden in this matter, resulting in his suspension from the bar (RT 30-33).

On April 2, 1992, having retained new counsel, Golden moved to set aside the default judgment against him, alleging El Camino's failure to serve him with the

third-party complaint as the basis for the motion (RA 300-01). The District Court denied the motion on April 16, 1992 (RA 356).

Golden appealed from the denial on May 14, 1992 (RA 300). In its per curiam opinion of March 3, 1993, the Court of Appeals for the Fifth Circuit vacated the default judgment and remanded the case to the district court for an evidentiary hearing. The Court of Appeals stated that the "ultimate question is now whether the Texas attorney, Allen Landerman, had authority to accept service on behalf of Golden" (RA 371). The court also stated that it would "leave [it] for the district court and express no other opinion about the authority of the attorney to accept process, or whether Golden otherwise entered an appearance in this case, or otherwise waived process" (RA 371).

On August 2, 1993, Golden filed a supplemental motion to set aside the default judgment, alleging, in addition to the failure to serve, that the district court should have held a hearing to set damages (RA 387-88) and that the allegations of alter ego in the third-party complaint were insufficient (RA 388-90).

After holding a hearing on August 30, 1993, Magistrate Sanderson decided as follows:

1. There was "not a scintilla of evidence" to show that Golden authorized Landerman to accept service for him prior to October 12, 1990 (RA 434), and Golden had not authorized Landerman to represent him personally at that time. However, despite "deficiencies" in Landerman's representation of Golden, Golden's "conduct or inaction in timely engaging in discovery [referring to the drafting of interrogatory responses on April 15, 1991], and in failing to call to the attention of the court or opposing counsel the fact he had not obtained a copy of pleadings naming him as a party" after he was fully aware he had been so named, "precludes him from collaterally attacking the judgment under Rule 60(b)". Further, the April 15, 1991 memorandum "confirms" that Golden retained Landerman to represent him personally (apparently at some indeterminate time after October 12, 1990) (RA 434).

2. The decision to hold a hearing to determine damages before granting default is discretionary, and even if it was error not to hold such a hearing, it is not error that can be raised in a motion under Rule 60(b) (RA 434-35).

3. The alter ego allegations against Golden were sufficient (RA 435).

The magistrate, therefore, denied the motion on September 3, 1993 (RA 437).

On October 4, 1993, Golden filed timely notice of appeal (RA 438).

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION OF THE COURTS BELOW CREATES AN UNWARRANTED BURDEN ON LITIGANTS WHO HAVE NOT BEEN SERVED TO TAKE ACTION ON THEIR CASES.

Building on this Court's holding that a defendant may waive his right to object to venue "by submission through conduct" as well as by "failure to assert it seasonably" (*Nierbo Co. v. Bethlehem Corp.*, 308 U.S. 165 at 168 [1939]), the lower federal courts have developed a body of doctrine which allows for "submission through conduct" as a means of waiving not only objections to venue, but objections to jurisdiction as well. *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994 (1983).

This case raises the question of just how far the courts should go in expanding the doctrine of *Nierbo* to treat the mere inaction of parties themselves as waivers of crucial rights, especially when those parties have not

been served and have not authorized counsel to accept service for them.

Here, the court below held that the defendant, though at the time of service he had not retained counsel to represent him personally or to accept service for him, waived the right to raise the defense of lack of personal jurisdiction because he did not take it upon himself to *personally* inform opposing counsel or the court that he had not been properly served with the complaint.

The court below found not only that Petitioner Golden was not served with the third-party complaint, and that he did not authorize Landerman to accept service for him, but also that Landerman kept Golden completely in the dark as to El Camino's application for default and the entry of a default judgment against him (RA 430-31).

Yet, solely because it also found that Golden had actual knowledge of the complaint by the time the default was requested, and drafted answers to interrogatories *after* the default judgment was entered, the court concluded that it was Golden's personal responsibility to contact the court or opposing counsel and inform them that he had not been served with "pleadings naming him as a party" (RA 434).

The underlying question these facts raise is whether the responsibilities of litigants should be expanded to the extent that, though not having been served or even retained counsel to represent them personally at the time of service, they must take it upon themselves to contact the court or opposing counsel and let them know about that service on their purported counsel was inadequate to acquire jurisdiction over them.

It is clear that a party may waive the lack of personal jurisdiction by appearing in a case and affirmatively asking the court to act on its behalf (*Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 786 [5th Cir. 1990]), or by appearing in the case and waiting an unreasonably long time before making the objection (*Marcial Ucin, S.A.v. SS Galicia*, 723 F.2d 994 [1983]) (motion to dismiss for lack of jurisdiction filed four years after general appearance).

Here, however, Golden made no appearance either personally or through an attorney, neither he nor any attorney moved the court for any action on his behalf, and there was no undue delay.

The court below found the facts here to be parallel to those on the basis of which the Fifth Circuit found waiver in *Broadcast Music, Inc. v. M.T.S. Enterprises*, 811 F.2d 278 (5th Cir. 1987). An examination of that

decision shows, however, that the cases are fundamentally different.

In the *Broadcast Music* case, Richard Tonry represented M.T.S., a company in which his mother and brother were shareholders. Tonry was aware that *Broadcast Music* moved to join his mother and brother in the lawsuit, and he was served with all of the relevant papers. There was a doubt as to whether his mother and brother were properly served, but Tonry did not raise it until the hearing on the motion to enter default against them. Meanwhile Tonry had, over a period of eight months, appeared at a pretrial conference and participated in settlement negotiations on behalf of all defendants. 811 F.2d 278, 280.

The Fifth Circuit found these facts sufficient to warrant a finding of waiver authorized by the parties. Taking an expansive view of the waiver doctrine, the court reasoned that the Federal Rules should not be taken to "suggest that defendant may halfway appear in a case, giving plaintiff and the court the impression that he has been served, and, at the appropriate time, pull failure of service out of the hat like a rabbit in order to escape default judgment." 811 F.2d at 281.

But even from *Broadcast Music*'s expansive perspective, there is no basis for waiver here. There

were no "halfway" appearances here, because there were no appearances at all, either by Golden personally or on his behalf, between the time the third-party complaint was filed naming him and the entry of default. Nor did the court suggest that *any* conduct on Golden's part before the default judgment was entered by which he might have given El Camino or the court "the impression that he had been served."

In *Trustees of Central Laborer's Welfare Fund v. Lowery*, 924 F.2d 731 (7th Cir. 1991), the Seventh Circuit took *Broadcast Music* and the waiver doctrine a step further in one respect, finding conduct after the entry of default sufficient to support a finding of waiver.

In *Lowery*, the default judgment was entered on June 22, 1983, and the defendants did not move to vacate that judgment for failure to serve until September 28, 1989. During the intervening six years, the defendants and their attorney had participated actively in proceedings relating to the satisfaction of the judgment without ever suggesting that there had been a problem with the service of the complaint. 924 F.2d 731, 733-34. Noting that "the activity of a defaulting party's attorney cannot alone support a finding of waiver," the court found confirmation in the involvement of the defendants themselves in the proceedings. 924 F.2d at 734.

The court concluded that the conduct of the defendants, taken together with that of their attorney, "indicated to the plaintiffs that service had been properly effectuated and that no such defense would be raised." 924 F.2d at 734.

Here, on the other hand, the court below found that Golden had no notice whatever of the entry of default, or of Landerman's effort to set it aside. If the "the activity of a defaulting party's attorney cannot alone support a finding of waiver," then it is difficult to see how a basis for waiver could be found here, where it is clear that Landerman did not represent Golden personally at the time he accepted service, and it is, *at most*, highly ambiguous whether and when he ever began to represent him personally.

Golden took only *one* action in this case during the period between the filing of the third-party complaint and the filing of the motion for relief from default at issue here: he drafted responses to the interrogatories put to him. That is by no means an action indicating "to the plaintiffs that service had been properly effectuated and that no such defense would be raised."

In fact, the rationale underlying the decision of the court below would justify the finding of waiver in virtually every case where a defendant not properly served has

actual knowledge of the lawsuit against him. Its message is that in every such case the defendant himself has the responsibility of calling the failure to serve to the attention of the court and opposing party, on penalty of having his inaction treated as a waiver if he fails to do so. If that is so, then the crucial distinction between proper service and actual notice of litigation, which has never been regarded as sufficient in itself to support *in personam* jurisdiction (*Way v. Mueller Brass Co.*, 840 F.2d 303, 306 [5th Cir. 1088]) will, of course, be obliterated.

Petitioner asks that this Court grant review here in order to consider the broader implications of this massive expansion of the principle it enunciated in *Nierbo*. This Court should take this opportunity to examine the question of whether the development of the concept of "submission through conduct" to include "halfway appearances" as in *Broadcast Music*, and a consideration of the conduct of the litigants as well as their attorneys as in *Lowery*, has not in the instant case over-extended the responsibility of parties themselves for the conduct of the litigation.

The expansion of the responsibility of litigants implicit in the doctrine employed by the court below raises questions of fairness as well as broader issues of public policy in the operation of the courts.

If defendants in Golden's position are to have the responsibility of contacting the courts or opposing counsel on their own, they should have fair warning of that responsibility. As things are currently, Golden had no reason to know during the crucial time period that there were, as the court below found, "deficiencies" in Landerman's purported representation of him (RA 434), or that he personally should make good those deficiencies by active involvement in the litigation. The problem with providing for a warning of parties in such circumstances, however, is that they are necessarily people who have not been formally served, and there is, therefore, no obvious channel for warning them.

The fairness problem is thus inherent in the situation: telling lay people after the fact that they should have been able to figure out for themselves that they ought to have gotten directly in touch with the court or the attorney on the other side to inform them of the failure to serve.

The broader issue of public policy is whether it is really in the long-run interest of efficient judicial administration to compel litigants in such circumstances to intervene directly in the litigation process, on peril of waiving the right to object to the exercise of power by courts which do not have personal jurisdiction over them.

The present case is an egregious one. It clearly demonstrates the need for this Court's action to set limits on the continuing expansion of the *Nierbo* "submission through conduct" doctrine which has here culminated in a decision taking the *inaction* of the *litigant himself* to constitute a waiver.

II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO VINDICATE PETITIONER'S RIGHT TO A HEARING BEFORE DAMAGES WHICH WERE NOT CERTAIN AND COULD NOT BE MADE CERTAIN BY COMPUTATION WERE AWARDED AGAINST HIM BY DEFAULT.

Under Federal Rule of Civil Procedure 55(a)(1) a default may be entered by the clerk of the court where the claim is "for a sum certain or for a sum which can by computation be made certain." Where the amount of the claim is not liquidated and cannot be established by a simple mathematical calculation, the court must hold a hearing to determine the amount of damages before the default judgment can be entered. *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979).

The court below did not contend that the damages here were liquidated or subject to computation. Instead, the court reasoned that "[t]he requirements of Rule 55

are not the standards by which Golden's Rule 60(b) motion is decided" (RA 435). Thus, in the view of the court below, even if the failure to conduct a hearing would warrant reversal on a direct appeal of the judgment, it did not warrant relief under the standards of Rule 60(b) (RA 435).

The published authority does not support that conclusion.

In *Collex, Inc. v. Walsh*, 74 F.R.D. 443 (E.D.Pa. 1977), the defendant invoked Rule 60(b) to vacate a default judgment on the basis that (1) the plaintiff had not given the notice required by Rule 55(b)(2), and (2) the amount of damages was not fixed and no hearing was held as required by Rule 55(b)(1).

In a careful opinion, the *Collex* court drew a clear distinction between these two grounds.

The court reviewed the failure to give notice by Rule 60(b) standards and found in the light of the circumstances that the default judgment should be allowed to stand as to liability. 74 F.R.D. 443, 451.

As to the damages issue, however, the court took a very different approach. The court first concluded that a hearing was required by Rule 55:

> "Although the cases discussing the sum certain requirement of Rule 55 are few and far between

> and rather exiguous in their reasoning, it is clear that a *judgment* may not be entered by default without a hearing, unless the amount claimed is a liquidated amount or an amount capable of mathematical calculation."
>
> 74 F.R.D. at 450.

Then, having concluded that the damages in the case before it were not certain, the court proceeded without further discussion of Rule 60(b) to order that the judgment "be reopened for the limited purpose of allowing defendant to litigate the amount of damages suffered by plaintiffs." 74 F.R.D. at 451.

The court in *Insurance Company of North America v. SS Hellenic Challenger*, 88 F.R.D. 545 (S.D.N.Y. 1980) took a similar view. The defendant there sought relief under Rule 60(b) on the basis that the summons and complaint served on it were misplaced, and also sought an evidentiary hearing on damages. 88 F.R.D. 545, 546-47.

The *Hellenic Challenger* court found the misplacing of the summons and complaint an insufficient basis for Rule 60(b) relief, but found that the judgment was not for "sum certain" and, therefore, ordered a hearing on damages, again without further discussion of Rule 60(b)'s standards.

The message of these decisions is clear and soundly based: while the particular facts of each request for relief from default must be weighed by the exacting standards of Rule 60(b) insofar as it seeks to vacate the determination of liability, a hearing to determine the extent of damages should be granted whenever such a hearing was wrongfully denied at the time default judgment was granted.

Judged by these soundly-reasoned decisions, the conclusion reached here by the courts below was clearly erroneous. This Court should grant review here in order to establish authoritatively that a new hearing on damages should always be granted in response to a motion under Rule 60(b) where it was erroneously omitted at the time the default was entered. Or, at least, this Court should exercise its authorize under Rule 16.1. and summarily remand this case to the District Court for a hearing on damages in order to correct the clear error of the lower courts.

III. THIS COURT SHOULD GRANT REVIEW IN ORDER TO ESTABLISH THAT A DEFAULT JUDGMENT BASED ENTIRELY ON CONCLUSORY ALLEGATIONS AND ENTERED WITHOUT NOTICE TO THE DEFENDANT SHOULD NOT WITHSTAND A CHALLENGE UNDER RULE 60(b).

The allegations of alter ego which form the sole basis of the default judgment here were entirely conclusory. They state *no* specific facts, merely reciting that Golden is the alter ego of Systems Technology which is a "sham corporation established by Golden to defraud and attempt to defraud its creditors" (RA 107). As no specific facts are alleged in support of these general and conclusory allegations, it is clear that the only cause of action supporting the default judgment against Golden would not withstand a motion to dismiss. *Forest County Potawatomi Community v. Doyle*, 828 F.Supp. 1401, 1405 (W.D. Wisc. 1993); *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985).

A long line of cases stemming from this Court's decision in *Thomson v. Wooster*, 114 U.S. 104 (1885), have held that facts which are not well pleaded cannot support a default judgment, and warrant its reversal on appeal. *Nishimatsu Construction Co. v. Houston National*

Bank, 515 F.2d 1200 (5th Cir. 1975); *Danning v. Lavine*, 572 F.2d 1386 (9th Cir. 1978); *Cripps v. Life Insurance Co of North America*, 980 F.2d 1261 (9th 1992).

Here, Golden had absolutely no notice either of the application for entry of default or the default judgment. Given this total lack of notice, the entry of default judgment deprived Golden of property without due process of law. *Sonus Corp. v. Matsushita Electric Industrial Co., Ltd.*, 61 F.R.D. 644 (D. Mass. 1974); *Mullane v. Central Hanover Trust Co.* (339 U.S. 306, 314 (1950).

The failure to give notice deprived Golden, not only of the opportunity to contest the default before judgment was entered, but also of the opportunity to appeal from the entry of that judgment. Under these circumstances, the vindication of Golden's due process rights require that he be given the same opportunity under Rule 60(b) to challenge the allegations on which the default judgment against him is based as he would have had if he been able to challenge it on appeal.

This Court should grant review here in order to reaffirm the venerable principle of *Thompson v. Wooster* in this context, and to assure litigants in Golden's position that they cannot be denied the opportunity to demonstrate the emptiness of the allegations against

them by the fact that total lack of notice deprived them of the opportunity to challenge a default judgment on appeal.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant its writ of certiorari to consider the issues raised by this Petition, or, at least, that it summarily remand this case to the District Court with instructions to hold a hearing to set the amount of damages due.

Because Landerman failed not only to give Golden timely notice of the third-party complaint naming him and of the request for and entry of default against him, but also failed to give Golden or anyone else at Systems Technology notice of the trial of Systems Technology's complaint against El Camino, neither Golden nor Systems Technology has *ever* had an opportunity to contest the merits of its dispute with El Camino. This Court should not allow the Federal Rules to be used in this manner to sustain a judgment against a litigant who,

through no fault of his own, was denied any opportunity to present his case on the merits.

Respectfully submitted,

ROBERT S. GERSTEIN,
Attorney for Petitioner
TERRY GOLDEN

APPENDIX A

U.S. DISTRICT COURT
NORTHERN DISTRICT
FILED
JAN 28 1991
NANCY DOHERTY, CLERK
By _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SYSTEMS TECHNOLOGY, INC.,	§	Cause No.
Plaintiff and Counterdefendant,	§	CA3-89-1297-H
	§	
vs.	§	
EL CAMINO RESOURCES, LTD.,	§	
Defendant, Counterclaimant and Third-Party Plaintiff,	§	
vs.	§	
BARBARA RICHARDSON and TERRY GOLDEN,	§	
Third-Party Defendants.	§	

ENTERED ON DOCKET
1-28-91 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

DEFAULT JUDGMENT

Came on to be heard the Application for Default Judgment of El Camino Resources, Ltd. against Barbara Richardson and Terry Golden and the Court, finding that Barbara Richardson and Terry

Golden, although properly served with Third-Party Complaints, have failed to deny any of the allegations contained in the Third-Party Complaints and have fully failed to answer or defend the Third-Party Complaints, is of the opinion that the Application should be granted. It is, therefore,

ORDERED, ADJUDGED AND DECREED that all of the factual allegations contained in the Amended Third-Party Complaint, attached hereto and fully incorporated herein, are taken as true and found by this court as facts; it is further

ORDERED, ADJUDGED AND DECREED that El Camino Resources, Ltd. have and recover judgment against Terry Golden for $151,629.64 for actual damages, ~~$_____ for exemplary damages~~ and $9,610.00 for attorneys' fees; it is further,

ORDERED, ADJUDGED AND DECREED that El Camino Resources, Ltd. have and recover judgment against Barbara Richardson for $1.00 for actual damages and ~~$_____ for exemplary damages;~~ it is further,

ORDERED, ADJUDGED AND DECREED that El Camino Resources, Ltd. recover its costs of court from Barbara Richardson and Terry Golden.

Signed this 28 day of January, 1991.

APPENDIX A

/s/ Barefoot Sanders
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. COURT OF APPEALS
FILED
MAR 3, 1993
RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. DISTRICT COURT
NORTHERN DISTRICT
FILED
APR 14 1993
NANCY DOHERTY, CLERK
By _____ Deputy

No. 92-1447

D.C. Docket No. 3:89-CV-1297-H

SYSTEMS TECHNOLOGY, INC.,

Plaintiff,

versus

EL CAMINO RESOURCES, LTD.,

Defendant-Third Party
Plaintiff-Appellee,

versus

TERRY GOLDEN,

Third Party Defendant-
Appellant.

Appeal from the United States District Court for the
Northern District of Texas

Before GARWOOD and HIGGINBOTHAM,

APPENDIX B

Circuit Judges, and SCHWARTZ[1], District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

March 3, 1993

ISSUED AS MANDATE:

APR 12 1993

A true copy

Test:
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ M. Tamany
New Orleans, Louisiana

APR 12 1993

[1] Senior District Judge of the Eastern District of Louisiana, sitting by designation.

U.S. COURT OF APPEALS
FILED
MAR 3, 1993
RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. DISTRICT COURT
NORTHERN DISTRICT
FILED
APR 14 1993
NANCY DOHERTY, CLERK
By _____ Deputy

No. 92-1447

SYSTEMS TECHNOLOGY, INC.,

Plaintiff,

versus

EL CAMINO RESOURCES, LTD.,

Defendant-Third Party
Plaintiff-Appellee,

versus

TERRY GOLDEN,

Third Party Defendant-
Appellant.

Appeal from the United States District Court for the
Northern District of Texas

(3:89-CV-1297-H)

Before GARWOOD and HIGGINBOTHAM,

APPENDIX B

Circuit Judges, and SCHWARTZ*, District Judge.

PER CURIAM:[1]

This is an appeal from an order declining to set aside a default judgment entered against Terry Golden. The ultimate question is now whether the Texas attorney, Allen Landerman, had authority to accept service of process on behalf of Golden. The argument is made to us that although Landerman acted on behalf of Golden, it was without Golden's knowledge. El Camino replies that after a default judgment had been entered, Golden executed answers to a set of interrogatories, and that those interrogatories reflected that Golden was a party to the suit; that Golden did other acts after the default from which it should be inferred that Landerman was authorized to receive service of process when he did. The district court declined to set aside the default, but did not file findings and conclusions.

We are persuaded that Landerman's authority

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*Senior District Judge of the Eastern District of Louisiana, sitting by designation.

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

should be resolved at a hearing before the district court with findings of fact and conclusions of law. We leave for the district court and express no other opinion about the authority of the attorney to accept process, or whether Golden otherwise entered an appearance in this case, or otherwise waived process.

The order of the district court denying the motion to set aside default judgment is vacated, and this case is remanded to the district court for an evidentiary hearing and ruling on the motion to set aside default judgment accompanied by findings of fact and conclusions of law.

VACATED AND REMANDED.

A true copy

Test:
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ M. Tamany
New Orleans, Louisiana

APR 12 1993

APPENDIX C

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 2 1993
NANCY DOHERTY, CLERK
By _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SYSTEMS TECHNOLOGY, INC.,	) 3-89-CV-1297-AH
vs.	)
EL CAMINO RESOURCES, LTD.,	)
vs.	)
BARBARA RICHARDSON and TERRY GOLDEN,	)

FINDINGS OF FACT AND CONCLUSIONS
OF LAW OF THE UNITED STATES
MAGISTRATE JUDGE

Pursuant to the Fifth Circuit's remand of this action to the District court for further proceedings (Systems Technology, Inc. v. El Camino Resources, Ltd. No. 92-1447), the parties' consent to proceed before a United States magistrate judge pursuant to 28 U.S.C. §636(c) as set out in their Joint Status Report filed on May 7, 1993, and the District

Court's order filed on May 25, 1993, on August 30, 1993, the hearing mandated by the Fifth Circuit was conducted before the undersigned. Based upon the evidence submitted and the stipulation of facts filed by the parties, the magistrate judge makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

1. At all relevant times prior to April 1991 Systems Technology, Inc., (STI) was a corporation doing business in this district. STI was solely owned by Terry Golden. At all relevant times Terry Golden was an individual who resided in this district.

2. During the period prior to the filing of this action initially in state court, until March 1990, Barbara Richardson, Terry Golden's first cousin, was president, secretary and a sales person for STI. Thereafter the only person who received correspondence addressed to STI at its place of business was Terry Golden.

3. Although Allen Landerman and Terry Golden eschewed any present recollection of discussions between them regarding institution of STI's suit against El Camino Resources, Ltd. (ECR), the contemporaneous time records of Mr. Landerman reflect that such communications took place (See

Hearing Exhibit 34). These bills reflect time billed for discussions between the two regarding this action, commencing with a 24 minute phone call with Mr. Goldman (sic) on May 18, 1989, two days after ECR removed this action to federal court. The remainder of the bills through November 8, 1991, reflect numerous telephone conferences with Terry Golden.

4. On October 16, 1989, ECR filed an amended counterclaim and third-party complaint naming STI as counterdefendant and Barbara Richardson as a third-party defendant. Landerman filed an agreed motion for continuance on February 6, 1990, representing himself to be counsel of record for both STI and Ms. Richardson.

5. On July 25, 1990, the then parties appearing through their counsel of record attended a mediation at which Mr.Landerman represented that STI would indemnify Ms. Richardson, in the event that she were found liable. A report of this mediation session wa filed on August 10, 1989. The billing records of Mr. Landerman (Exhibit 34, supra) reflect two phone conferences between Mr. Landerman and Mr. Golden between the date that the mediation was ordered and that on which the mediation occurred.

6. On October 12, 1990, an Agreed Order was submitted to and signed by the District Court granting ECR leave to add Terry Golden as a third-party Defendant. Allen Landerman signed the Agreed Order as "Attorney for Systems Technology, Inc., Barbara Richardson and Terry Golden."

7. Simultaneous with the entry of the Agreed Order, ECR's Second Amended Counterclaim and Third-Party Complaint was filed adding Golden as a third-party defendant, alleging inter alia that Golden was the alter ego of STI.

8. Landerman agreed with counsel for ECR to accept service on behalf of Golden.

9. A copy of the Second Amended Counterclaim and Third-Party was delivered to Landerman, who accepted service on behalf of Golden.

10. At the time Landerman agreed to accept service of ECR's Second Amended Counterclaim and Third-Party Complaint on behalf of Terry Golden, ECR's counsel believed that Mr. Landerman had authority to accept process on behalf of Mr. Golden. Landerman assumed he had authority to accept process on behalf of Mr. Golden, but he had no received express authority from Golden to accept process or to represent Golden in this action at such time.

11. Terry Golden maintained a file on this action in which he kept correspondence and pleadings which were sent to STI in care of Mr. Golden (Hearing Exhibit 29). While I find that it is not a complete file of all written communications relative to this action, it does contain copies of substantially all filings in the action and the related orders of the court for the period between May 16, 1989 and September 24, 1990. Mr. Golden's file also contains selected communications between himself on behalf of STI and Mr. Landerman's office. Other written communications between Mr. Golden and Mr. Landerman were either not retained when received or generated or were destroyed by Mr. Golden prior to the time he produced Hearing Exhibit 29 for inspection.

12. Additional written communications between Mr. Golden and Mr. Landerman's office are found in the file maintained by Mr. Landerman. These exhibits and the testimony of Mr. Landerman establish that the following were sent or received by Mr. Golden:

a. Defendant Golden'S memo to Landerman dated 2 February, 1990 (Hearing Exhibit 7).

b. Defendant Golden's memo to Landerman, dated 11 July, 1990 (Hearing Exhibit 40).

c. Landerman's transmittal of agreed order filed October 12, 1990, dated October 23, 1990 (Hearing Exhibits 2 and 17).

d. Landerman's transmittal of ECR's interrogatories served on Defendant Golden, individually, dated November 26, 1990 (Hearing Exhibit 4; See also Hearing Exhibit 22).

e. Landerman's transmittal to Defendant Golden, at Mirage Hotel, dated December 11, 1990 with a copy of ECR's responses to Plaintiff's interrogatories (Hearing Exhibits 31 and 33).

f. Defendant Golden's memo to Landerman dated 15 April 1991, with his handwritten draft of answers to ECR's interrogatories served on Defendant Golden, individually (Hearing Exhibit 3).

g. Landerman's transmittal of District Court's order granting continuance (filed April 9, 1991) dated April 26, 1991 (Exhibit 28).

13. The evidence reflects that Landerman never provided Defendant Golden with a copy of ECR's Second Amended Counterclaim and Third-Party Complaint in which he was added as an individual third-party defendant.

14. No answer was ever filed on behalf of Defendant Golden to ECR's third-party complaint filed on October 12, 1990.

15. Landerman did not provide Defendant Golden with a copy of ECR's request for entry of default against him or of the clerk's entry of default which were filed on January 25, 1991.

16. Landerman did not provide Defendant Golden with a copy of the District Court's default judgment filed on January 28, 1991. No hearing was held on ECR's application for default.

17. On July 8, 1991, Mr. Landerman filed a motion to set aside the default judgment entered against STI, Barbara Richardson and Terry Golden which was denied by the District Court pursuant to an order filed on July 17, 1991. Golden was never advised concerning the filing of the motion or the disposition.

18. To the extent that any of the following conclusions of law constitute findings of fact, the same are adopted by reference and incorporated herein.

CONCLUSIONS OF LAW:

1. To the extent that any of the foregoing findings of fact constitute conclusions of law, the same are adopted by reference and incorporated herein.

2. Service of process:

In its opinion the Fifth Circuit remanded this action to the District Court with the express

direction to determine Mr. Landerman's authority to receive service of process for Terry Golden when he did. The stipulated facts (See parties' stipulations of fact filed on August 25, 1993) and the testimony presented at the evidentiary hearing establish that Landerman had no such authority. Despite ECR's counsel's reliance on Landerman's represented authority and Landerman's apparent belief that he could accept service on behalf of Golden, there is not a scintilla of evidence to show prior to October 12, 1990, that Golden had given Landerman authority to accept service of process on his behalf. Accordingly any reliance which ECR may have placed in Landerman's representations is insufficient to establish that process was effected in accordance with prescribed procedures.

3. Waiver of Service:

The Fifth Circuit declined to express any view on whether Golden had entered an appearance or otherwise waived service. That service may be waived is well-settled. The Fifth Circuit opinion in Broadcast Music v. M.T.S. Enterprises, 811 F.2d 278 (5th Cir. 1987), is of specific significance and importance in addressing this issue. As the Court made clear in the context of a Rule 60(b) motion, such as that filed by Golden, service need only

comply with constitutionally minimal due process requirements. Id. at 281, citing A.L.T. Corp. v. Small Business Administration, 801 F.2d 1451, 1458-59 (5th Cir. 1986). The credible evidence in the instant case parallels the facts related in Broadcast Music.

It is clear that the primary oversight of this case from STI's standpoint was undertaken by Mr. Golden. The memoranda which he sent to Landerman evidence his active participation. Golden testified that of the total communications between himself and Landerman only about 40% was written. It is clear that Golden was well aware of the fact that his cousin, Ms. Richardson, had been named as a third-party defendant. It is apparent that he informed Landerman that STI would indemnify Ms. Richardson prior to the mediation on July 25, 1990 (See Finding of Fact No. 5).

Despite the fact that Golden apparently never received a copy of ECR's Second Amended Counterclaim and Third-Party Complaint, the credible evidence shows that he was not unaware of his status as a defendant party in this action. As noted above it is clear that he was aware that ECR's inclusion of his cousin, Ms. Richardson, as a third-party defendant exposed her to potential monetary

damages at least no later than the mediation scheduled on July 25, 1990.

It is clear that Golden received ECR's interrogatories which not only listed him as a third-party defendant in the caption, but were addressed to him individually as a party (See Finding of Fact No. 12.d.) prior to the filing of the request for default. In addition many of the interrogatories were directed to Golden's personal assets (See Hearing Exhibit 22, Interrogatories 7, 9, 10, 11, 12 and 13). Golden did not comply with the directives of the transmittal letter, and only provided answers on April 15, 1991, on the day before the magistrate judge heard ECR's motion to compel (See Magistrate Judge's order filed on April 16, 1991).

It is impossible to ascertain the specifics of the communications between Golden and Landerman over the course of this litigation either due to the fact that their recollections are clouded by the passage of time or due to their intentional lapses of memory, or both. However, having observed the demeanor of these witnesses on the stand, particularly that of Mr. Golden, Golden's professed ignorance of legal matters and his professed ignorance of the nature and import of the pleadings which were served on him by Landerman are

unworthy of belief and are rejected.

To the contrary the evidence shows that Golden holds a degree in finance, has completed a year of study towards an MBA degree, and took a course in business law as part of his higher education. The evidence shows that Golden had founded at least one corporation prior to the incorporation of STI and that STI was formed at least in part to circumvent tax liabilities owed by the former corporation, TASS. This background not only demonstrates his above average intelligence, but his sophistication in corporate affairs.

That Golden fully appreciated the basis for ECR's theory of liability and his inclusion as a party defendant is firmly established by his memo to Landerman in April 1991 (Hearing Exhibit 3). Not coincidentally the memorandum confirms that Golden had retained Landerman to represent him as well as Barbara Richardson in this action.

In conclusion, although the evidence shows deficiencies in the manner in which Landerman represented Golden, none of which are attributable to the conduct of ECR and its counsel, Golden's conduct or inaction in timely engaging in discovery, and in failing to call to the attention of the court or opposing counsel the fact he had not obtained a

copy of pleadings naming him as a party precludes him from collaterally attacking the judgment under Rule 60(b). Denial of his motion does not offend the principles of due process since he is free to pursue remedies against Mr. Landerman based on deficiencies in the latter's representation.

4. Failure to conduct hearing on ECR's request for default:

In his supplemental motion filed on August 2, 1993, Golden for the first time claims error based upon the fact that the District Court conducted no hearing prior to the entry of judgment against him.

The record reflects that the District Court entered judgment based upon the affidavit of David Harmon, ECR's president, filed with ECR's application for default judgment on January 25, 1991. Golden does not contest the accuracy of the monetary damages reflected in the affidavit, but instead argues that the statements in the affidavit are conclusary, thus mandating a hearing to satisfy the requirements of Rule 55.

The requirements of Rule 55 are not the standards by which Golden's Rule 60(b) motion is decided. Moreover, Rule 55(b)(2) gives discretion to the court to determine whether a hearing is necessary. Even if it be assumed that the failure to

conduct an evidentiary hearing would have been grounds for reversal in the context of a direct appeal (See e.g. United States for use of M-Co Construction, Inc. v. Shipco General, Inc., 814 F.2d 1011, 1014 (9th Cir. 1987), it does not constitute a basis for relief under the heavier burden imposed upon a Rule 60(b) movant, particularly where Golden has never proffered evidence suggesting that the damages awarded were excessive.

5. Failure to allege a cause of action against Golden:

As his final basis for relief, also alleged for the first time in his supplemental motion, Golden contends that the Second Amended Counterclaim and Third-Party Complaint as it relates to him individually is legally insufficient. A review of this pleading establishes that his contention is without merit. ECR clearly set out the contractual breaches committed by STI (Amended Counterclaim and Third-Party Complaint of ¶¶6-15). ECR in turn alleged with particularity that Golden was liable by reason of his status as alter ego of STI and because STI was a sham corporation (Id. at ¶19). Under the notice pleadings requirements applicable to federal court actions the pleadings are sufficient. Further, where a party has defaulted, liability is established.

Finally, Golden has cited no case authority holding that the allegations such as those presented in ECR's pleadings are insufficient under Rule 12(b)(6) standards.

It appears that Golden also argues that the judgment is unsupportable because the claims against STI were dismissed (See Golden's Proposed Conclusion of Law 41). While the claims against STI were dismissed without prejudice, except for ECR's claims for attorneys' fees (See Magistrate Judge's Order filed on August 12, 1991), that fact does not absolve Golden of liability. Golden correctly observes that the doctrine of alter ego is not an independent cause of action under Texas state law, but is rather an equitable remedy. Kern v. Gleason, 840 S.W.2d 730, 736 (Tex. App. - Amarillo 1992, no writ). However, absent a showing that the corporate entity is fully capable of discharging any judgment incurred - a principal basis for refusing to disregard the corporate structure - Golden cannot avoid liability.

Based upon the preceding Findings of Fact and Conclusions of Law Third-Party Defendant Terry Golden has failed to show that he is entitled to relief pursuant to Rule 60(b).

A copy of these Findings of Fact and Conclusions

of Law shall be transmitted to counsel for the parties.

ENTERED this 2nd day of September, 1993.

/s/ Wm. F. Sanderson, Jr.
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

U.S. DISTRICT COURT
NORTHERN DISTRICT
FILED
SEP 2 1993
NANCY DOHERTY, CLERK
By _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SYSTEMS TECHNOLOGY, INC.,	) 3-89-CV-1297-AH
vs.	)
EL CAMINO RESOURCES, LTD.,	)
vs.	)
BARBARA RICHARDSON and TERRY GOLDEN,	)

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law filed this day by the magistrate judge,

It is ORDERED, ADJUDGED AND DECREED that Third-Party Defendant Terry Golden's Motion to Set Aside Default Judgment is in all things denied.

A copy of this judgment shall be transmitted to counsel for the parties.

ENTERED this 2nd day of September,

1993.

/s/ Wm. F. Sanderson Jr.
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

U.S. COURT OF APPEALS
FILED
AUG 30 1994
CHARLES R. FULBRUGE III,
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1909

SYSTEMS TECHNOLOGY, INC.,

Plaintiff,

vs.

EL CAMINO RESOURCES, LTD.,

Defendant-Third Party
Plaintiff-Appellee,

v.

TERRY GOLDEN,

Third Party-Defendant-
Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:89-CV 1297 AH)

Before KING and BENEVIDES, Circuit Judges, and

APPENDIX E

LEE*, District Judge.

PER CURIAM:**

AFFIRMED. See Local Rule 47.6.

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* District Judge of the Southern District of Mississippi, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

No.

In the Supreme Court of the United States

October Term, 1994

SYSTEMS TECHNOLOGY, INC.,

Plaintiff

vs.

EL CAMINO RESOURCES, LTD.

Defendant/Third-Party
Plaintiff/Appellee,

vs.

TERRY GOLDEN,

Third Party
Defendant/Appellant

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with the **PETITION FOR WRIT OF CERTIORARI** by first-class mail, postage prepaid on the 28th day of November, 1994.

The Hon. William F. Sanderson, Jr., Judge
c/o Clerk, United States District Court
Northern District of Texas,
Dallas Division
1100 Commerce Street, Capitol A-20
Dallas, TX 95242

Clerk, United States Court of Appeals
for the Fifth Circuit
600 Camp St.
New Orleans, LA 70130

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ROBERT S. GERSTEIN
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TERRY GOLDEN